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Sin Kheng Chuan & Anor v Sin Kheng Hooi

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCVC)-(W)-1378–08 OF 2016
ABANG ISKANDAR, BADARIAH SAHAMID AND MARY LIM JJCA
14 MARCH 2019

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Trusts and Trustees — Duties — Fiduciary duty — Whether trustee acted to detriment of trust and unjustly enriched himself — Whether trustee misrepresented to beneficiary actual value of trust shares and unduly influenced latter to sell his trust shares for grossly low amount and to accept paltry sum in settlement of his suit against trustee for breach of fiduciary duties

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The instant appeal was against the High Court's allowing of the respondent's claims against the appellants for breaching their fiduciary duties as trustee/constructive trustee of a trust that was created for the benefit of the respondent and his children for a 20 year period. The trust was created over 75,075 shares ('the trust shares') in a company ('SKBC') by an individual (since deceased) who, together with the first respondent ('A1') were the original two trustees of the trust. A1 continued as the sole trustee following his co-trustee's death. A1 was the respondent's brother while the second appellant ('A2') was A1's wife. A1 owned 99% of the shares in SKBC while the respondent held the remaining 1%. Both of them were the only two directors of the company until the respondent made way for A2 to become the director. In his suit, the respondent accused A1 of, inter alia, buying the trust shares from him at a price far below their market value, unjustly enriching himself from the sale of SKBC's shares (which included the trust shares) and inducing the respondent (through undue influence and misrepresentation) into signing a settlement agreement under which he was paid a grossly low amount (compared to the market value of the trust shares) as full and final settlement of his claims with respect to the trust shares.

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Held, dismissing the appeal and affirming the decision of the High Court:

(1) The trial judge did not commit any error in findings of fact or law to warrant appellate intervention. A1 had breached his fiduciary duty as trustee to the trust and had used his position as sole trustee to unjustly enrich himself when he sold SKBC's shares in the SKB Group. He had appropriated the entire proceeds from the disposal of the shares. The respondent's share of the sale proceeds on his portion of the SKBC shares

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amounting to RM9,597,621.70 was never deposited into any trust account. A1 did not give any explanation for his failure to do so (see paras 18, 22–23, 26 & 47).

(2) There was credible and cogent evidence to support the trial judge's finding that A1, who was in a dominant position to the respondent, had exerted undue influence on the respondent to sign the settlement agreement ('SA'). Being the sole trustee of the trust, A1 was in a fiduciary relationship to the respondent. The circumstances surrounding the SA were such that the respondent was placed at a disadvantage. The lawyer (SD3) who was hired by A1 to prepare the SA did not explain the contents of the document to the respondent before he signed it. This was exacerbated by the fact that the SA, in cl 3 thereof, effectively precluded the respondent from obtaining independent legal advice. Coupled with this was SD3's testimony that the SA was prepared entirely on A1's instructions (see para 40).

(3) The trial judge was right in finding that the SA was void and unenforceable on the grounds of undue influence and misrepresentation perpetrated by A1 upon the respondent. The misrepresentation in the SA was as to the true value of the respondent's shares in SKBC. Had the respondent known that the value of his shares exceeded RM13m, he would not have sold his shares to A1 for a meagre RM1.5m under the share sale agreement nor would he have accepted the paltry sum of RM1.38m under the SA as full and final settlement of his claims against the appellants for their breach of fiduciary duties in respect of the trust (see paras 45–47).

(4) A2 was rightly found liable to the respondent as constructive trustee to the trust. She was a director of SKBC and a fiduciary of its shares, including the trust shares, which were disposed of unconscionably and in breach of the trust. As director of the company at the material time, A2 knew of the loan that SKBC had made to A1, the amount of which comprised the respondent's portion of the trust shares. The evidence from the appellants was that SKBC had granted a loan of RM40,939,688 to A1 as director. This sum comprised the entire proceeds of sale of SKBC's shares in the SKB Group and included the respondent's trust shares. The loan to A1 contravened s 133 of the Companies Act 1965 which precluded a company from giving loans to its directors (see paras 52, 55–56 & 58).

[Bahasa Malaysia summary

Rayuan ini terhadap keputusan mahkamah tinggi membenarkan tuntutan responden terhadap perayu yang melanggar tanggungjawab fidusiarinya sebagai pemegang amanah/pemegang amanah konstruktif yang diwujudkan untuk kelebihan responden dan anak-anaknya untuk tempoh masa 20 tahun.

Amanah tersebut diwujudkan terhadap 75,075 saham ('saham amanah tersebut') dalam satu syarikat ('SKBC') oleh seorang individu (yang kini telah meninggal dunia) yang mana bersama dengan responden pertama ('A1') merupakan dua pemegang amanah saham tersebut. A1 meneruskan sebagai pemenang amanah tunggal selepas kematian pemegang amanah bersamanya. A1 merupakan adik responden manakala perayu kedua ('A2') merupakan isteri A1. A1 memiliki 99% saham dalam SKBC manakala responden memegang baki 1% tersebut. Kedua-dua mereka merupakan satu-satunya pengarah syarikat tersebut sehingga responden memberi laluan kepada A2 untuk menjadi pengarah. Dalam guamannya, responden menuduh A1 telah, antaranya, membeli saham amanah tersebut daripadanya dengan harga dibawah harga pasaran, secara salah mengkayakan dirinya sendiri daripada penjualan saham SKBC (yang meliputi saham amanah) dan mempengaruh responden (melalui pengaruh tidak wajar dan salah nyata) untuk menandatangani perjanjian penyelesaian dibawah mana dia telah dibayar jumlah rendah (berbanding dengan nilai pasaran saham amanah tersebut) sebagai penyelesaian penuh dan muktamad tuntutannya berkaitan dengan saham amanah tersebut.

Diputuskan, menolak rayuan dan mengekalkan keputusan Mahkamah Tinggi:

(1) Hakim bicara tidak melakukan apa-apa kekhilafan fakta atau undang-undang untuk memerlukan campur tangan rayuan. A1 telah melanggar tanggungjawab fidusiarinya sebagai pemegang amanah kepada amanah tersebut dan menggunakan kedudukannya sebagai pemegang amanah tunggal untuk mengayakan dirinya secara salah apabila dia menjual saham SKBC kepada dirinya dalam kumpulan SKB. Dia telah mendapatkan keseluruhan hasil daripada pelupusan saham tersebut. Bahagian responden daripada hasil penjualan berdasarkan bahagian saham SKBC terjumlah kepada RM9,597,621.70 tidak pernah didepositkan kedalam mana-mana akaun amanah. A1 tidak memberikan apa-apa penjelasan atas kegagalannya untuk berbuat sedemikian (lihat perenggan 18, 22–23, 26 & 47).

(2) Wujud keterangan kredibel dan meyakinkan untuk menyokong dapatan hakim bicara bahawa A1, yang berada dalam kedudukan dominan dengan responden, telah menggunakan pengaruh tidak wajar terhadap responden untuk menandatangani perjanjian penyelesaian ('PP') tersebut. Sebagai pemegang amanah tunggal amanah tersebut, A1 mempunyai hubungan fidusiari kepada responden. Keadaan disebalik SA tersebut adalah sedemikian yang responden diletakkan di kedudukan yang merugikan. Peguam ('SD3') yang dilantik oleh A1 untuk menyediakan PP tidak menerangkan isi kandungan dokumen tersebut kepada responden sebelum dia menandatanganinya. Keadaan ini menjadi lebih teruk lagi dengan fakta bahawa PP tersebut, dalam klausa

A 3, mengecualikan responden daripada mendapat nasihat undang-undang bebas. Perkara ini, bersama dengan keterangan SD3 bahawa PP tersebut disediakan berdasarkan arahan A1 semata-mata (lihat perenggan 40).

B (3) Mahkamah bicara betul dalam mendapati bahawa PP tersebut terbatal dan tidak boleh dikuatkuasakan atas alasan pengaruh tidak wajar dan salah nyata yang dilakukan oleh A1 terhadap responden. Salah nyata dalam PP adalah berkaitan dengan nilai sebenar saham responden dalam SKBC. Sekiranya responden mengetahui nilai sahamnya melebihi C RM13 juta, dia tidak akan menjual sahamnya kepada a A1 untuk RM1.5 juta sahaja dibawah perjanjian penjualan saham mahupun dia menerima jumlah kecil RM1.38 juta dibawah PP sebagai penyelesaian penuh dan muktamad tuntutannya terhadap defendan untuk pelanggaran tanggungjawab fidusiarinya berkenaan dengan amanah D tersebut (lihat perenggan 45–47).

(4) A2 secara betul didapati bertanggungan terhadap defendan sebagai pemegang amanah konstruktif. Dia merupakan pengarah SKBC dan seorang fidusiari terhadap sahamnya, termasuklah saham amanah, yang E telah dilupuskan melanggar amanah tersebut. Sebagai pengarah syarikat pada waktu material tersebut, A2 mengetahui bahawa pinjaman yang SKBC telah berikan kepada A1, jumlah yang meliputi bahagian responden terhadap saham amanah tersebut. Keterangan daripada semua perayu bahawa SKBC telah memberikan pinjaman RM40,939,688 F kepada A1 sebagai pengarah. Jumlah ini meliputi hasil penjualan saham SKBC dalam Kumpulan SKB dan meliputi saham amanah milik responden. Pinjaman kepada A1 melanggar s 133 Akta Syarikat 1965 yang tidak membenarkan satu syarikat daripada memberikan pinjaman kepada pengarahnya (lihat perenggan 52, 55–56 & 58).]

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Notes

For cases on fiduciary duty, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3230–3231.

H **Legislation referred to**

Companies Act 1965 s 133
Contracts Act 1950 s 16(1)

I **Appeal from:** Civil Suit No 22NCVC-848–12 of 2012 (High Court, Pulau Pinang)

SC Tan (SC Tan) for the appellant.
Mura Raju (K Govindaraju with him) (G Raju & Co) for the respondent.

Badariah Sahamid JCA:

INTRODUCTION

[1] This is an appeal against the decision of the learned trial judge, delivered on 30 June 2016 after full trial, which allowed the plaintiff's claim against the defendants in respect of 75,075 trust shares in Sin Kean Boon Capital Sdn Bhd, ('SKBC').

[2] For ease of reference parties will be referred to as they were in proceedings before the High Court. The salient facts are derived from the learned trial judge's 'alasan penghakiman' with necessary modifications.

BACKGROUND FACTS

[3] The plaintiff and the first defendant are brothers. The second defendant is the wife of the first defendant.

[4] The first defendant is the registered proprietor of 99% of the shares in SKBC. The plaintiff is the registered proprietor of the remaining 1% of the shares of SKBC. The first defendant and the plaintiff are the two directors of SKBC. However, on 1 April 2006, the plaintiff was asked to resign as director and the second defendant was appointed as director in his place.

[5] On 3 December 1994 a trust ('the said trust') was made by the late Sin Kean Boon together with the first defendant as original trustees of the said trust for the benefit of the plaintiff and the plaintiff's children. On the demise of Sin Kean Boon, the first defendant became the sole trustee of the said trust.

[6] The said trust consists of 75,075 ordinary shares of RM1 each in SKBC. At all material times the issued share capital of SKBC consists of 231,000 ordinary shares at RM1 each. The total authorised share is 500,000 ordinary shares.

[7] The trust is valid for 20 years commencing from 3 December 1994–3 December 2014. The value of the said trust in the year 1995 was estimated to be at around RM10m. In 1997, the value of the said trust was estimated at RM38m. With the passage of time the value was expected to rise to at least RM50m.

[8] According to the terms of the said trust, the funds of the said trust are for the benefit of the beneficiaries of the said trust ie the plaintiff and the plaintiff's children.

[9] On 30 November 2010, the plaintiff had filed an action against the defendants in the Penang High Court in Civil Suit No 22–811 of 2010. After appearance was entered, parties negotiated and the abovementioned suit was withdrawn when parties entered into a settlement agreement.

[10] The settlement agreement dated 25 March 2011 was entered into between the plaintiff and the first defendant. A sum of RM1.38m was paid to the plaintiff in full and final settlement of disputes between the parties in respect of the said trust and the civil action in Civil Suit No 22–811 of 2010.

THE PLAINTIFF'S CLAIM

[11] The plaintiff's claim against the first defendant is primarily for breach of fiduciary duties as a trustee of the said trust, in particular in obtaining undue benefit from the proceeds of the same. The plaintiff's claim against the second defendant is premised on a breach of fiduciary duties as a constructive trustee of the said trust.

ISSUES TO BE TRIED

[12] The agreed issues to be tried before the High Court are as follows:

(a) whether the first defendant as sole trustee of the 75,075 shares held by the first defendant has administered the said trust and obtained unjust enrichment from the said trust?

(b) whether there was pressure, coercion, undue influence and misrepresentation by the first defendant in the administration of SKBC and the plaintiff's 75,075 shares?

(c) whether the accounts of the said trust were prepared and given to the plaintiff?

(d) whether the settlement agreement is enforceable? and

(e) whether the second defendant was a constructive trustee of the plaintiff in respect of the plaintiff's 75,075 shares in SKBC from 23 March 2011?

FINDINGS AND DECISION OF THE HIGH COURT

[13] The findings and decision of the learned trial judge may be summarised as follows:

(a) the first defendant as sole trustee of the said trust for the benefit of the plaintiff and his children, had breached his fiduciary duties as trustee and had obtained unjust enrichment from the said trust;

(b) the settlement agreement between the first defendant and the plaintiff was void and unenforceable on the grounds that the first defendant as sole trustee of the said trust had exercised coercion and undue influence in the administration of SKBC and the plaintiff's 75,075 trust shares;

(c) the first defendant had made a misrepresentation in cl 1(iii)(b) of the settlement agreement, that the amount stated therein was the amount in the audited accounts of SKBC for the year 1995;

(d) the settlement agreement is void and unenforceable; and

(e) the second defendant is liable as a constructive trustee in respect of the plaintiff's trust shares of 75,075 shares of SKBC.

THE FIRST AND SECOND DEFENDANTS' GROUNDS OF APPEAL

[14] In the memorandum of appeal, the first and second defendants' grounds of appeal may be summarised as follows.

The first defendant

Breach of trust

[15] The learned trial judge had erred in law and in fact in her failure to appreciate the following:

(a) while the plaintiff's pleaded case is premised on the first defendant's breach of trust of 75,075 shares in SKBC of which the first defendant is trustee, Her Ladyship had relied on the loan to the first defendant and the disposal of 24.5% shares of SKB Group Bhd as evidence of the first defendant's breach of trust to the plaintiff;

(b) the loan to the first defendant as well as the disposal of 24.5% equities of SKBC, if at all, were wrongs committed against SKBC. Thus, the proper party to sue is not the plaintiff but SKBC itself by way of a derivative action; and

(c) there is no evidence that the proceeds of sale of the 24.5% equities of the SKB Group of RM29,531,146.20 was appropriated by the first defendant. On the contrary, the annual returns and directors' report showed it was utilised to reduce the borrowings of SKBC.

The settlement agreement

[16] The learned trial judge had erred in law and fact when she set aside the settlement agreement between the first defendant and the plaintiff. The reasons are as follows:

A (a) the relationship between the first defendant and the plaintiff's family was already bad;

(b) the plaintiff understood the contents of the settlement agreement;

B (c) there was no misrepresentation in respect of cl 1(iii)(b) of the settlement agreement on account of the failure to verify the amount of RM1,796,879.93 in the audited account of year 1995 of SKBC as this figure was not disputed by the plaintiff or the first defendant; and

C (d) the learned trial judge had erred in her finding that the plaintiff was unaware that in 2011 the first defendant owed RM40,939,688 which comprise proceeds from the sale of shares of the SKB Group and in her conclusion that had the plaintiff known that the actual price of his shares was RM12m, the plaintiff would not have sold his trust shares for RM1.5m.

D *The second defendant constructive trustee*

[17] The learned trial judge had erred in law and in fact in finding the second defendant liable as a constructive trustee for the 75,075 shares in SKBC for the E following reasons:

(a) the mere fact that the second defendant is a director of SKBC and has access to all records of SKBC and has knowledge of the loan to the first defendant is insufficient to make the second defendant liable as a constructive trustee of the said trust shares of the plaintiff;

F (b) after the second defendant became a director of SKBC, in 2012, the sum of RM40,903,577 was written off as 'bad debts', as reflected in in the audited account for 31 December 2012; and

G (c) the proceeds of the disposal of the plaintiff's trust shares never reached the second defendant's hands.

OUR JUDGMENT

[18] On careful perusal of the appeal records, as well as the oral and written H submissions of counsels, we are of the considered view that there was no error in the learned trial judge's findings of fact or law to warrant appellate intervention. We therefore affirmed the decision of the learned trial judge and dismissed the appeals of the first and second defendants/appellants with costs. The grounds of our decision are set out below.

I *Claim against the first defendant breach of fiduciary duty*

[19] In the trial judge's findings, the first defendant had breached his fiduciary duty of care as sole trustee to the said trust. In her 'alasan

penghakiman', Her Ladyship had supported her findings by the following evidence. A

[20] On 1 November 1999 the plaintiff and the second defendant had entered into a sale and purchase agreement in respect of the 75,075 shares of SKBC which comprise the assets in the said trust of which the first defendant was the sole trustee. The first defendant had purchased the plaintiff's 75,075 shares for RM1.5m, which is far below its market value. B

[21] According to documentary evidence, between 8 January 1996–August 1999, a total of 6,319,943 shares in the SKB Group owned by SKBC was sold by the first appellant for a sum of RM29,531,146.20. As a result, thereof the plaintiff was entitled to the sale proceeds to the extent of his 75,075 shares. The plaintiff's share of the sale proceeds was calculated to be at RM9,597,621.70. C D

(RM29,531.20 divided by 231,000 shares = RM127.84 RM127.84 x 75,075 shares = RM9,597,621.70).

[22] In addition, from the documentary evidence of the accounts of SKBC for the year ending 31 December 1998, 24.5% of SKBC shares were sold in 1998. This was the main investment for the 75,075 trust shares of the plaintiff in SKBC. The first defendant had admitted in his testimony that the first plaintiff was not informed of this disposal. Neither did the first defendant show any accounts to the plaintiff in connection with the share sale which would have accumulated in the said trust from 1994–2014. The first defendant had appropriated the entire proceeds of the said disposal of shares in the sum of RM29,531,146.20. E F

[23] From the evidence, the learned trial judge found that the first defendant had not deposited the plaintiff's portion of the proceeds of the said disposal in any trust account. No explanation was given by the first defendant for his failure to do so. G

[24] In his cross-examination the first defendant had admitted that at the material time the first defendant was in a dominant position as registered owner of 230,999 shares in SKBC (99%). Thus the first defendant had the opportunity to take advantage of his position as director of SKBC and sole trustee of the plaintiff's 75,075 trust shares to control and manage the affairs of SKBC to his advantage. H I

[25] The first defendant owned 99% shares in SKBC. The plaintiff, on the other hand, only owned one share in SKBC. The first defendant and the plaintiff were the only directors of SKBC. Thus, the plaintiff had acted as a

A mere 'rubber stamp' to the first defendant in approving the 'back dated' resolutions of SKBC.

[26] We have carefully considered the abovementioned supporting evidence referred to by the learned trial judge in arriving at the decision that the first defendant had breached his fiduciary duty as trustee to the said trust. The first defendant had also obtained an unjust enrichment in the form of sale proceeds from the disposal of the plaintiff's portion of SKBC shares which the learned trial judge calculated to be in the sum of RM9,597,621.70. We have no reason to depart from the trial judge's finding in this respect.

[27] We are also of the view that the first defendant is the proper party against which the plaintiff has brought this action as the first defendant is the sole trustee of the said trust (which comprise 75,075 shares in SKBC) and the plaintiff's cause of action against the first defendant is for a breach of fiduciary duty and unjust enrichment by the misappropriation of the proceeds of the disposal of the plaintiff's 75,075 shares in SKBC. Thus, the first defendant's contention that in the circumstances the proper suit is by way of derivative action commenced by SKBC is misconceived.

Undue influence

[28] Pursuant to the settlement agreement dated 25 March 2011 between the plaintiff and the first defendant, the plaintiff had received RM1.38m from the first defendant, purportedly as full and final settlement of disputes between the parties in respect of the trust shares.

[29] The findings of the learned High Court judge were premised on the following evidence.

[30] The first defendant had admitted writing a letter to the plaintiff instructing the plaintiff to withdraw the civil suit against the defendant. The plaintiff was also directed by the first defendant to advise the plaintiff's solicitors accordingly.

[31] It is not disputed that the plaintiff's trust shares were in the sole control of the first defendant. The plaintiff had alleged that the first defendant had threatened to sever family relations, bankrupt the plaintiff and leave nothing for the plaintiff and his children after the trust comes to an end in 2014.

[32] The settlement agreement was prepared by SD3 (Daphne Choy Gaik Choo) a solicitor from the firm of Choy & Assoc. In her testimony, the learned High Court judge had made a finding that there was a material discrepancy between SD3's testimony in her examination in chief and in cross-examination

in respect of what transpired when the plaintiff came to SD3's office to sign the settlement agreement on 25 March 2011.

[33] In her witness statement, SD3 had stated that she had given the plaintiff three copies of the settlement agreement and asked the plaintiff to read the same. SD3 then asked the plaintiff whether he understood the contents of the settlement agreement. On the plaintiff confirming that he understood the contents of the settlement agreement, SD3 had instructed the plaintiff to initial on every page of the settlement agreement. SD3 had confirmed that she did not explain to the plaintiff the contents of the settlement agreement. Neither did the plaintiff inform SD3 that he did not understand the contents of the settlement agreement.

[34] However, in cross-examination SD3 had stated that the plaintiff had read the contents of the settlement agreement aloud to SD3 and the plaintiff had stated he understood the contents of the settlement agreement before signing the same.

[35] The learned High Court judge had made a finding that in the light of the material discrepancy in the abovementioned evidence and the absence of any explanation thereto, the evidence of SD3 that the plaintiff had understood the contents of the settlement agreement before he signed the same, was not credible.

[36] We find there was no error in the trial judge's evaluation of the reliability of the evidence of SD3 who was a material witness in respect of whether the plaintiff had understood the contents of the settlement agreement.

[37] It was not disputed that the plaintiff was not represented by any solicitors. SD3 had testified that she had prepared the settlement agreement on the instructions of the first defendant only. Before the settlement agreement was signed on the 25 March 2011, SD3 had never met or communicated with the plaintiff. On the same date, the settlement agreement had been finalised and was ready to be signed by the plaintiff.

[38] In addition, the learned High Court judge had referred to cl 3 of the settlement agreement, which as he found to be as unreasonable as it did not reflect what actually had transpired. The said cl 3 provides as follows:

> 3. The 1st Party confirms that he understands the contents of the Agreement herein and elects to not appoint his own independent legal (adviser or solicitors to advise him on this agreement.

('The first party' refers to the plaintiff)

[39] What is meant by 'undue influence'? According to s 16(1) of the Contracts Act 1950:

> 16(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
>
> (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another —
>
> (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
>
> (b) ...

[40] We are of the considered view that from the above evidence before the trial court, there was credible and cogent evidence to support the learned trial judge's findings that the first defendant who was in a dominant position to the plaintiff, had exerted undue influence on the plaintiff in signing the settlement agreement. The first defendant, being the sole trustee of the said trust was indisputably in a fiduciary relation to the plaintiff. In addition the circumstances surrounding the settlement agreement were such as to place the plaintiff at a disadvantage. The plaintiff had not understood the contents of the settlement agreement as the same was not explained to him by SD3. This was exacerbated by a most unusual clause (cl 3 abovementioned) which effectively precluded the plaintiff from the benefit of independent legal advice. Coupled with this was SD3's testimony that the settlement agreement was prepared entirely on the instructions of the first defendant.

[41] Given the above circumstances, the learned trial judge's finding that there was undue influence emanating from the first defendant to induce the plaintiff to sign the settlement agreement was neither perverse nor plainly wrong so as to warrant our appellate intervention.

Misrepresentation

[42] The learned trial judge had also made a finding that the first defendant had made a representation in cl 1(iii)(b) of the settlement agreement, which provides as follows:

> 1. The 1st Party of the one part and the 2nd Party of the other part hereby agree that the abovementioned Dispute between the parties is settled on terms as follows:
>
> (i) ...
>
> (ii) ...
>
> (iii) the 1st party agrees upon receipt of the settlement sum to do the following:

(a) ....

(b) To make no further claims whatsoever and/or however in respect of and/or arising from the Trust dated 3 December 1994, the Share Sale Agreement of 1 November 1999 between the parties, and the shares held by the 1st Party in SKB Capital including *the amount of RM1,796,879.93 which was the sum stated as due to the 1st Party since 1995 in SKB Capital's audited accounts;* (Emphasis added.)

[43] It was the finding of the learned trial judge that there was a misrepresentation that the amount above stated was the amount in the audited accounts of SKBC for the year 1995, when SD3 had not referred to the relevant audited account, but merely stated the abovementioned figure on the instructions of the first defendant.

[44] The learned High Court judge had referred to the documentary evidence of the audited accounts of SKBC for the years 1995–1999, 2008 and 2011. The audited accounts showed the amounts stipulated as being loans to a director. In his cross-examination, the first defendant had admitted that the 'director' referred to was the first defendant himself.

[45] The learned trial judge had considered the evidence that in 2011, the amount owing by the first defendant was RM40,939,688 which comprise the proceeds of the share sale of SKBC in the SKB Group. The plaintiff was not informed when he signed the share sale agreement on 1 November 1999 where the sale price was RM1.5m. Neither was the plaintiff informed that the first defendant had appropriated the entire proceeds of the share sale transaction. Had the plaintiff been made aware that the value of his share was RM13,305,398, the plaintiff would not have sold his shares to the first defendant for a meagre RM1.5m.

(RM40,939,688 divided by 231,000 = RM177

RM177 x 75,057 shares = RM13,305,398)

[46] It is our considered view that the learned trial judge had properly referred to the audited accounts as well as the testimony of SD3 in order to arrive at the finding that there was a misrepresentation by the first defendant to the plaintiff on the true value of his shares. We also agreed with the trial judge's observation that had the plaintiff known that the true value of his shares was in excess of RM13m, it is inconceivable that he would have agreed to accept the paltry sum of RM1.38m in the settlement agreement. Thus there was a misrepresentation by the first defendant to the plaintiff that had induced the plaintiff to sign the settlement agreement.

[47] Premised on the above, the learned trial judge made a finding that the share sale transaction between the plaintiff and the first defendant was unjust. The first defendant had exerted undue influence on the plaintiff and utilised his position as the sole trustee of the said trust to unjustly enrich himself. Thus, the settlement agreement is void and unenforceable as the same was signed by the plaintiff as a consequence of undue influence and misrepresentation perpetrated by the first defendant upon the plaintiff.

[48] On evaluation of the abovementioned evidence we find no reason to depart from the abovementioned findings of the learned trial judge.

Claim against the second defendant constructive trustee

[49] The learned trial judge had found the second defendant liable as a constructive trustee of the plaintiff's 75,075 trust shares in SKBC. The findings of the learned trial judge was premised on the following evidence.

[50] The second defendant was the wife of the first defendant, who was the sole trustee of the said trust as well as the registered proprietor of 99% of the shares of SKBC. The second defendant admitted that at all material times she was aware that 75,075 shares in SKBC were the subject of the said trust in favour of the plaintiff and his children for 20 years.

[51] In her evidence, the second wife of the first defendant (see para 3) had admitted that the sum of RM150,000 that was paid to the plaintiff as part payment for the settlement agreement dated 23 March 2011, came from the joint account of the first and second defendants.

[52] The evidence from the first and second defendants were that a sum of RM40,939,688 was taken out of SKBC by the first defendant as a loan to himself as a director of SKBC. This sum comprises the entire proceeds of the sale of SKBC's shares in the SKB Group. It is to be noted that this sum included the plaintiff's trust shares of 75,075 shares in SKBC.

[53] In addition, the learned trial judge had found that the documentary evidence of the audited accounts for the year ending 31 December 2012 showed that the exact sum of RM40,903,577 had been written off as 'bad debts'. At that time the second defendant had already been appointed as a director of SKBC to replace the plaintiff. In her cross-examination, the second defendant had admitted knowledge of this.

[54] The learned trial judge had also found that in their testimonies, the first and second defendants had alleged that the RM40,903,577 had been written off as 'bad debts' on the advice of their tax agent. However, the said tax agent

was never called to confirm this piece of crucial evidence.

[55] In any event, s 133 of the Companies Act 1965 prohibits a company from giving loans to its directors. Thus, the loan of RM40,903,577 to the first defendant was in contravention of the abovementioned section.

[56] As a director of SKBC from her appointment to the position on 1 April 2006 the second defendant had access to all the records of SKBC as well as knowledge of the loan to the first defendant, the amount of which comprised the plaintiff's portion of 75,075 trust shares. Thus the second defendant is a constructive trustee of the 75,075 trust shares of the plaintiff in SKBC from 26 March 2011.

[57] Constructive trusts are imposed by the court as a result of the conduct of the trustee. While English law provides there is no clear and all-embracing definition of a constructive trustee, the concept has been developed in circumstances that it would be unconscionable to deny the beneficial interest of a party. Be that as it may:

> All the commentators accept that the following three situations give rise to the imposition of a constructive trust: first, where advantages have been obtained by fiduciaries breaching their duty of loyalty, secondly, where there has been a disposition of trust property in breach of trust, and, thirdly, where advantages have been obtained by fraudulent or unconscionable conduct. (Parker & Mellows, *The Modern Law of Trusts*, 8th Ed, London Sweet & Maxwell 2003 at p 313.)

[58] The learned trial judge had made findings that the second defendant who was a director of SKBC was a fiduciary of SKBC shares which includes the plaintiff's 75,075 shares. there has been a disposition of the plaintiff's share of the proceeds of sale of the trust shares in breach of trust and this was obtained by the unconscionable conduct of the first and second defendants. Thus, we find no reason to depart from the trial judge's findings of fact or of law. We therefore affirmed the decision of the learned trial judge in respect of the liability of the second defendant as a constructive trustee to the said trust.

[59] For all the reasons stated above we had affirmed the decision of the learned trial judge in respect of the first and second defendants/appellants and we had dismissed both the first and second defendants' appeals with costs subject to allocatur fees and we had also ordered that deposit to be refunded to the appellants.

A *Appeal dismissed; decision of the High Court affirmed.*

Reported by Ashok Kumar

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